NO. 33520

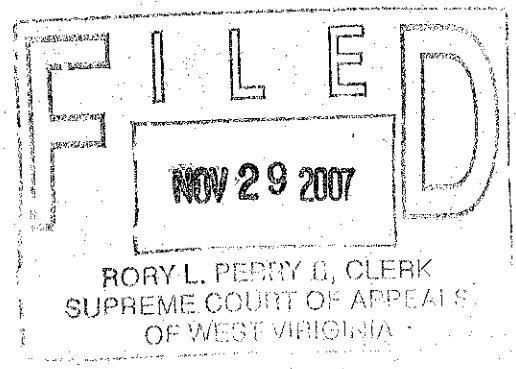
IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

CHARLESTON



JERRY NEAL and KAREN NEAL,

Petitioners,

v.

J. D. MARION,

Respondent.

REPLY BRIEF OF APPELLANTS

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November 29, 2007

I. PRELIMINARY STATEMENT

This is Appellants' memorandum in reply to the Brief of the Appellee, J.D. Marion. Since Appellants anticipated, and thoroughly refuted, most of Appellee's arguments in their initial brief, this brief is limited to a few minor, but necessary, observations and comments.

II. LEGAL ARGUMENT

A. The *Shirkey* Holding Must Be Clarified.

As anticipated, Appellee relies heavily upon a strict reading of this Court's prior ruling in *Shirkey v. Mackey*, which held:

> *West Virginia Code* §55-2-6a (1983) sets an arbitrary time period after which ***no action, whether contract or tort***, may be initiated against architects and builders. Pre-existing statutes of limitation for both contract and tort actions continue to operate within this outside limit.

Syl. pt. 1, 399 S.E.2d 868, 184 W. Va. 157 (1990)(emphasis added). The breadth of this language gives rise to confusion. Neither the Court in deciding *Shirkey* nor the Legislature in enacting *W. Va. Code* §55-2-6a intended for the subject statute to be applied to every conceivable claim under the sun, giving builders and architects a "license to kill." The statute of repose at issue is simply inapplicable to Appellants' claims for fraud and civil conspiracy against the builder and sellers.

The Court should acknowledge that the above-quoted syllabus point omits essential limiting language that is contained in the statute. Appellants respectfully suggest that the holding in *Shirkey* should read: *West Virginia Code* §55-2-6a sets an arbitrary time period after which no action, whether contract or tort, ***arising from the construction of any improvement to real property***, may be initiated against architects and builders.

Compare, for instance, the Court's syllabus point holding penned approximately six months after the *Shirkey* opinion in *Gibson v. W.Va. Dept. of Highways*:

> *W. Va. Code* §55-2-6a limits the time period in which a suit may be filed ***for deficiencies in the planning, design, or supervision of construction of an improvement to real property*** to ten years.

Syl. pt. 1, 185 W.Va. 214, 406 S.E.2d 440 (1991)(emphasis added). Fleshing-out this holding, the Court specifically acknowledged in *Gibson* that the "builders and architects" statute of repose does not violate due process guarantees *because* it is limited to specific causes of action:

> *W. Va. Code* §55-2-6a has a ten-year limitation and bars recovery ***in three general areas***. The first relates to damages "for any deficiency in the planning, design, surveying, observation or supervision of any construction[.]" The second involves damages arising from "the actual construction of any improvement to real property[.]" The third area is "for any injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property[.]"

185 W.Va. 214, 220, 406 S.E.2d 440, 446 (emphasis added).

Indeed, *Gibson* implicitly stands for Appellants' position in this case – their fraud and civil conspiracy claims ***arise from*** the Appellee's and co-defendants' ***lies*** employed to induce them into purchasing the subject real property (on a date remote from the construction of the house there by Appellee), and those claims do not fit within the categories of claims governed by *W. Va. Code* §55-2-6a. As such, the trial court committed clear error in dismissing Appellants' fraud and civil conspiracy claims against Appellee, and its ruling must be reversed.

B. Appellee's Arguments Regarding the Fraud and Civil Conspiracy Claims Are Without Merit.

First of all, Appellants do not suggest that their fraud and civil conspiracy claims are not "torts." *See Appellee's Brief* at 4. Fraud and civil conspiracy are indeed torts. However, as

established above, fraud and civil conspiracy are not torts that fall within the categories of claims governed by *W. Va. Code* §55-2-6a.

Secondly, Appellants agree that the "discovery rule" is inapplicable (absent any "obstruction" as mentioned in *W. Va. Code* §55-2-17) to claims governed by *W. Va. Code* §55-2-6a. *See Appellee's Brief* at 7. On the other hand, Appellants correctly assert that the discovery rule ***is*** applicable to their claims of fraud and civil conspiracy, which are governed instead by the general two-year statute of limitations found at *W. Va. Code* §55-2-12. *McCoy v. Miller*, 213 W. Va. 161, 578 S.E.2d 355 (2003); *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997); *Wooten v. Roberts and Legacy One, Inc.*, 205 W. Va. 404, 518 S.E.2d 645 (1999); *Stemple v. Dobson*, 184 W. Va. 317, 400 S.E.2d (1990); *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

Finally, Appellants' fraud and civil conspiracy claims do not ***arise from*** deficiencies in the construction, as Appellee feebly argues. *See Appellee's Brief* at 6. What distinguishes this case from all previously-decided "builder cases" is the builder's involvement in a subsequent sale of real estate. The Appellee builder inserted himself into the pitching of the real estate to Appellants and, along with the co-defendants, explicitly denied the existence of defects and prior repairs that defendants knew to exist.[1] Appellants' damages arise from the fact that they were induced by the defendants' lies to purchase a "money pit," when they would never have made that purchase if they had known the truth. As such, the fraud and civil conspiracy claims ***arise***

[1] The elements of fraud are: (1) the act claimed to be fraudulent was the act of one or all of the Defendants; (2) the act was material and false; (3) Plaintiffs relied on it and were justified under the circumstances in relying upon it; and (4) Plaintiffs were damaged because they relied on it. *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927). Civil conspiracy is the combination of two or more parties to commit a tort. *Dixon v. American Indus. Leasing Co.*, 162 W. Va. 832, 253 S.E.2d 150 (1979).

from misrepresentations and omissions at the time of sale, not from the construction several years earlier.

C. The Court Should Apply the Doctrine of Equitable Estoppel To Deprive Appellee of the Benefit of W. Va. Code §55-2-6a in This Case.

Appellants believe that the question of whether the doctrine of equitable estoppel applies to claims limited by *W. Va. Code* §55-2-6a is one of first impression. Appellants also believe it is a question of basic fairness, as the law does not intend to reward those perpetrators who actively conceal their wrongdoing long enough to time-bar their victims' remedy. "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232, 79 S.Ct. 760, 762 (1959).

Appellants argue that application of the doctrine of equitable estoppel is fair in this case for two reasons: (1) because of the builder's fraud at the time of the sale of the real estate to Appellants, when he expressly denied the existence of defects and prior repairs which he knew to exist; and (2) because of concealment of inadequate construction and prior repairs to the foundation by walling in and covering up large portions of the foundation so as to prevent discovery by a "normal" home inspection (as supported by Appellants' expert witnesses).

The doctrine of equitable estoppel is explicitly applicable to claims under *W. Va. Code* §55-2-6a by virtue of *W. Va. Code* §55-2-17, which partially codifies the doctrine as an exception to all periods of limitation contained in Article 2, Chapter 55 of the Code. Specifically, *W. Va. Code* §55-2-17 provides, in pertinent part: "Where any such right as is mentioned ***in this article*** shall accrue against a person, if such person shall ... by any other indirect ways or means, obstruct the prosecution of such right ... the time that such obstruction may have continued shall not be computed as any part of the time within which the said right

might or ought to have been prosecuted." (Emphasis added.) *See also Duttine v. Savas*, 455 F.Supp. 153, 161 (D.C.W.V. 1978)(application of equitable estoppel, pursuant to *W. Va. Code* §55-2-17 ***and general equitable authority of the court***, is an equitable solution to what would otherwise be an unjust and harsh result); *Blais v. Allied Exterminating Co.*, 198 W.Va. 674, 678, 482 S.E.2d 659, 663 (1996)(because the trial court did not consider any aspect of the equitable estoppel argument, remand was required), citing Syllabus Pt. 2, *South Side Lumber Co. v. Stone Construction Co.*, 151 W.Va. 439, 152 S.E.2d 721 (1967).

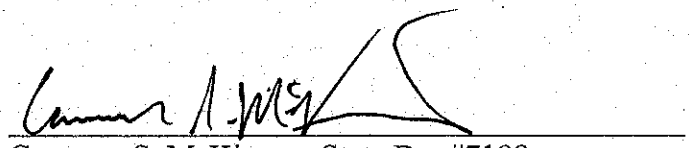
Appellee ineffectively attempts to avoid the application of *W. Va. Code* §55-2-17 by pleading the doctrine of *expression unius est exclusion alterius*. *See Appellee's Brief* at 9-10. However, the *expression unius* maxim does not abate the primary rules of statutory construction. The plain language of *W. Va. Code* §55-2-17 indicates that its provisions apply to "any such right as is mentioned ***in this article***," and the builders and architects statute of repose was deliberately codified by the Legislature in ***Article 2***, Chapter 55.

Nevertheless, and perhaps more importantly, the Court's option to apply the doctrine of equitable estoppel is not limited to application via *W. Va. Code* §55-2-17. The Court may apply the doctrine pursuant to its general equitable authority to achieve a just and fair result. The Appellee did not, and could not, argue that "fairness" and "equity" are on his side. Appellee's position is essentially that the Court should not consider the evidence of his fraud, concealment, and obstruction, and should absolve him due to the mere passage of time. The Court should emphatically reject such a position.

III. CONCLUSION

Based upon the record and in accordance with persuasive authority, Petitioners respectfully request that the Court reverse the ruling of the circuit court, and remand the claims against Respondent for further proceedings.

Respectfully submitted,
Jerry and Karen Neal
Petitioners
By Counsel



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CERTIFICATE OF SERVICE

I, Cameron S. McKinney, counsel for the Petitioners, do hereby certify that I have this 29th day of November, 2007, served the foregoing ***Reply Brief of Appellants*** upon counsel for all parties, via United States Mail, to the following addresses:

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